

Congress of the United States
Washington, DC 20515

January 11, 2019

The Honorable John Ring
Chairman
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Dear Chairman Ring:

We write in strong opposition to the proposed rule, “The Standard for Determining Joint Employer Status.” This proposed rule would narrow the standard for determining when employees have multiple employers under the National Labor Relations Act (NLRA).¹ Doing so would undermine employees’ rights to bargain for better wages and working conditions with the businesses that control those terms and conditions. This rulemaking appears to be tainted by one National Labor Relations Board (NLRB) Member’s conflict of interest, and the NLRB has failed to allay concerns surrounding this appearance.

The proposed rule seeks to overturn the NLRB’s 2015 decision in *Browning-Ferris*, which closed a loophole that prevented workers from organizing and negotiating for better pay and conditions.² Employers have increasingly moved away from directly hiring employees to relying on permatemps or subcontracting arrangements, often in an attempt to avoid negotiating with a unionized workforce. Approximately three million Americans are employed by a temporary staffing agency on any given day, often receiving less pay than the employees they work alongside who were directly hired by the client company.³ Whenever two or more entities co-determine or share control over the terms and conditions of employment, then both entities may be considered to be joint employers. The *Browning-Ferris* decision prevented corporations from dodging their legal obligations simply because they exercised control indirectly through their intermediary, or because they reserved control in their contract with the intermediary.

On December 28, 2018, the Court of Appeals for the D.C. Circuit explicitly affirmed the *Browning-Ferris* standard for determining a joint-employment relationship.⁴ The court found that *Browning-Ferris* was consistent with the common law of agency, and invalidated the proposed rule by finding that “the common-law inquiry is not woodenly confined to indicia of direct and immediate control.”⁵ The court also noted that the NLRB must “color within the

¹ The Standard for Determining Joint Employer Status, 83 Fed. Reg. 46681 (Sept. 14, 2018) (to be codified at 29 C.F.R. § 103.40).

² 362 NLRB No. 186 (2015).

³ Employees on Nonfarm Payrolls by Industry Sector and Selected Industry Data, Bureau of Labor Statistics (last accessed Nov. 29, 2018), available at <https://www.bls.gov/news.release/empsit.t17.htm>.

⁴ *Browning-Ferris Indus. v. NLRB*, Case Nos. 16-1063, 16-1064, 2018 U.S. App. LEXIS 36706 at *4 (D.C. Cir. Dec. 28, 2018).

⁵ *Id.* at *27.

common-law lines identified by the judiciary.”⁶ To prevent executive branch overreach, the Board should withdraw this proposed rule and abide by *Browning-Ferris* consistent with the court’s remand instructions.

We are deeply concerned that the NLRB appears to have designed this rulemaking in order to facilitate the participation of Member William Emanuel. Member Emanuel’s former law firm, Littler Mendelson P.C., represents one of the parties in *Browning-Ferris*. In December, the NLRB overruled *Browning-Ferris* by lifting the dissent from that decision and incorporating it wholesale into its decision in *Hy-Brand Industrial Contractors*.⁷ Member Emanuel violated his ethics pledge by participating in *Hy-Brand*, because it was part of the same deliberative process as *Browning-Ferris*. As a result, the Inspector General notified Congress of “a serious and flagrant problem and/or deficiency in the NLRB’s administration of its deliberative process.”⁸ The NLRB’s ethics official concluded that Member Emanuel violated his ethics pledge, and the NLRB vacated *Hy-Brand* shortly after, on February 26.⁹ Less than three months later, the NLRB announced that its intention to issue a rulemaking to overturn *Browning-Ferris*.¹⁰

Federal regulations require executive branch employees “to avoid any actions creating an appearance that they are violating the law or the ethical standards...”¹¹ In issuing a proposed rule so shortly after the NLRB failed to achieve the identical result in adjudication, the NLRB appears to be evading federal ethics rules in order to achieve a predetermined outcome, regardless of ethical considerations or negative consequences for workers. Moreover, the proposed rule would have the same effect as the *Hy-Brand* decision, by benefitting Member Emanuel’s former law firm and its corporate clients. Not only does this process undermine the public trust, but it does so in service of reinforcing corporate power over particularly vulnerable segments of the labor force.¹²

The NLRB has not taken any steps sufficient to remedy the appearance of a conflict of interest. We understand that, on June 8, the NLRB announced it would conduct a review of its ethics and recusal policies, citing the controversy surrounding its joint-employer decisions as justification for the review.¹³ However, instead of completing the review or otherwise reassuring

⁶ *Id.* at *26.

⁷ 365 NLRB No. 156 (2017).

⁸ Notification of a Serious and Flagrant Problem and/or Deficiency in the Board’s Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter, National Labor Relations Board Inspector General (Feb. 9, 2018) (“OIG Report Regarding *Hy-Brand* Deliberations”), available at https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1535/OIG%20Report%20Regarding%20Hy_Brand%20Deliberations.pdf.

⁹ *Hy-Brand Industrial Contractors*, 366 NLRB No. 26 (2018).

¹⁰ Office of Public Affairs, NLRB Considering Rulemaking to Address Joint Employer Standard (May 9, 2018) available at <https://www.nlr.gov/news-outreach/news-story/nlr-considering-rulemaking-address-joint-employer-standard>; see also John F. Ring, @NLRBChairman (May 9, 2018 at 11:52 AM) <https://twitter.com/NLRBChairman/status/994289076042895360> (“The Board majority will work to issue a proposed rule ASAP...”).

¹¹ 5 C.F.R. § 2635(b)(14).

¹² OIG Report Regarding *Hy-Brand* Deliberations at 5.

¹³ Office of Public Affairs, NLRB to Undertake Comprehensive Internal Ethics and Recusal Review (June 8, 2018) available at <https://www.nlr.gov/news-outreach/news-story/nlr-undertake-comprehensive-internal-ethics-and-recusal-review>.

the public that necessary changes are being made, the NLRB has aggressively pushed forward to reach a premeditated anti-worker conclusion.¹⁴ Although Member Emanuel has been reportedly cleared to participate in the rulemaking, he was cleared according to the very recusal procedures currently under review.¹⁵ Needless to say, this process has been wholly unsatisfactory.

As you noted in the aftermath of the *Hy-Brand* controversy, whenever the public calls into question the ethical underpinnings of the NLRB's work, the NLRB must ensure that "it not only adheres to exacting standards of integrity and impartiality...but that it is perceived by the public as adhering to such standards."¹⁶ Under your own terms, the NLRB must err in favor of protecting the public's confidence in its deliberative process.

For the reasons detailed above, we urge the NLRB to withdraw the proposed rule.

Sincerely,



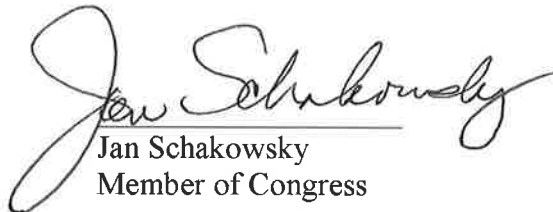
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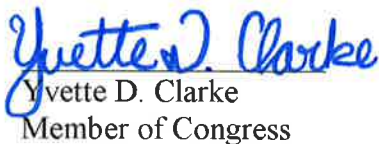
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¹⁴ Hasan A. Kanu, "NLRB Ethics Review to Remain Under Wraps for Now, Chairman Says," Bloomberg Law (Oct. 25, 2018) available at <https://news.bloomberglaw.com/daily-labor-report/nlr-ethics-review-to-remain-under-wraps-for-now-chairman-says-1>.

¹⁵ Chris Opfer and Robert Iafolla, "Labor Board Member Cleared on Ethics Question," Bloomberg Law (Nov. 9, 2018) available at <https://www.bna.com/trump-labor-board-n57982093767/>.

¹⁶ *Hy-Brand Industrial Contractors, Ltd.*, 366 NLRB No. 93 (2018) (Chairman Ring and Member Kaplan concurring).



Barbara Lee
Member of Congress



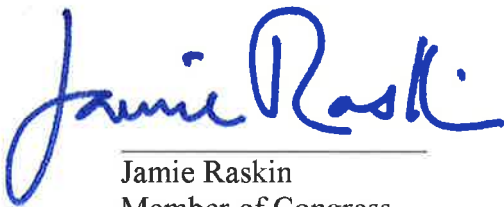
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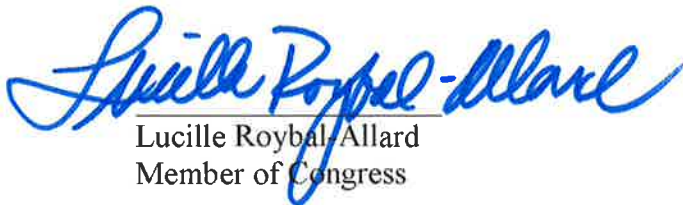
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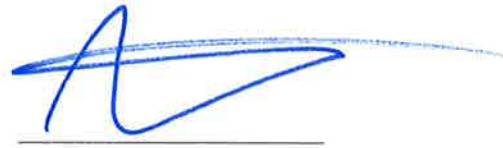


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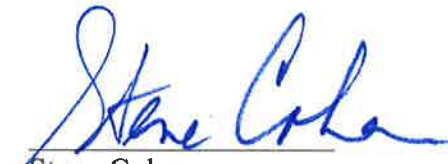

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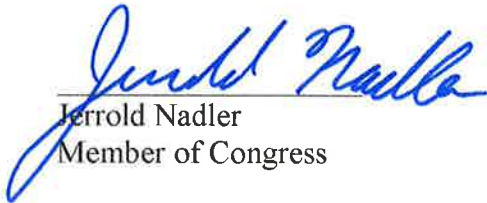

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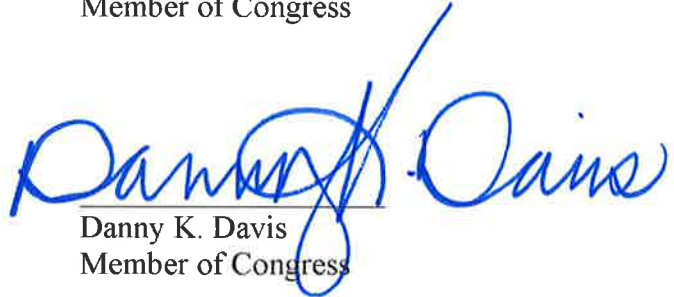
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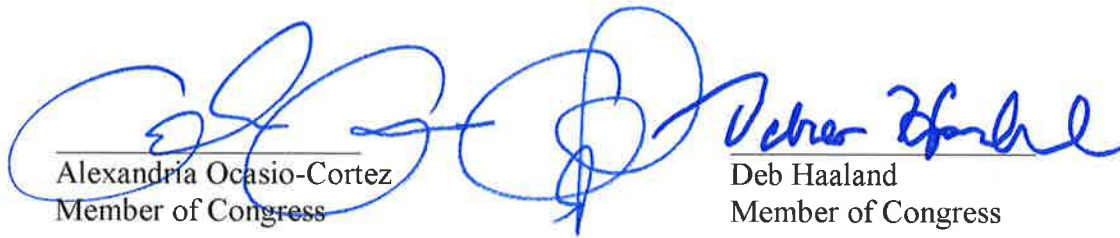
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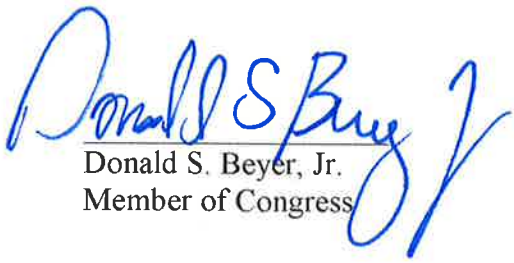
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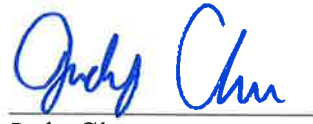
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